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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/598,383	10/17/2008	Donald McCallum	129530.00211	3374
21269	7590	02/17/2011	EXAMINER	
PEPPER HAMILTON LLP			LE, MARK T	
ONE MELLON CENTER, 50TH FLOOR				
500 GRANT STREET			ART UNIT	PAPER NUMBER
PITTSBURGH, PA 15219			3617	
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			02/17/2011	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)
	10/598,383	MCCALLUM, DONALD
	Examiner	Art Unit
	MARK T. LE	3617

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 13 January 2011.
 2a) This action is **FINAL**. 2b) This action is non-final.
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 42 is/are pending in the application.
 4a) Of the above claim(s) 4-25 and 27-40 is/are withdrawn from consideration.
 5) Claim(s) _____ is/are allowed.
 6) Claim(s) 1-3, 26, 41-42 is/are rejected.
 7) Claim(s) _____ is/are objected to.
 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
 10) The drawing(s) filed on 25 August 2006 is/are: a) accepted or b) objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ . |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date <u>Aug'06</u> | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1. Applicant's election with traverse of Species I, claims 1-42, in the reply filed on January 13, 2011 is acknowledged. The traversal is on the grounds of without a serious burden, the features of the different species being included in generic claim 1, and Species III and IV being equivalent in scope. This is not found persuasive because different search strategies and approaches would be used depending upon which species is elected for the examination, and that the task of performing different search strategies and approaches for the different species of the instant application would present a serious burden in the examination process. As to the argument directed to the features of the different species being covered by the generic claim, note that currently there is no evidence that generic claim 1 has a special technical or allowable feature; however, upon the allowance of a generic claim, application will be entitled to consideration of claims to the additional species which are written in dependent form or otherwise include all of the limitations of an allowable generic claim. Regarding the argument to Species III and IV being equivalent in scope, the argument is not relevant because the elected invention is Species I instead of Species III or IV.

The requirement is still deemed proper and is therefore made FINAL.

2. Claims 4-25 and 29-37 are objected to under 37 CFR 1.75(c) as being in improper form because a multiple dependent claim cannot depend from any other multiple dependent claims. See MPEP § 608.01(n). Accordingly, the claims have not been further treated on the merits.

3. Among the remainder claims, it is noted that claims 27-28 and 38-40 do not read on the elected invention, Species I; therefore, claims 27-28 and 38-40 have been withdrawn from further consideration as being drawn to non-elected inventions.
4. The oath or declaration is defective. A new oath or declaration in compliance with 37 CFR 1.67(a) identifying this application by application number and filing date is required. See MPEP §§ 602.01 and 602.02.

The oath or declaration is defective because:

It does not state that the person making the oath or declaration believes the named inventor or inventors to be the original and first inventor or inventors of the subject matter which is claimed and for which a patent is sought.

5. In the specification, page 18, line 21, "Fig. 29a and 29f" should read -- Fig. 29e and 29f --.
6. The following guidelines illustrate the preferred layout for the specification of a utility application. These guidelines are suggested for the applicant's use.

Arrangement of the Specification

As provided in 37 CFR 1.77(b), the specification of a utility application should include the following sections in order. Each of the lettered items should appear in upper case, without underlining or bold type, as a section heading. If no text follows the section heading, the phrase "Not Applicable" should follow the section heading:

- (a) TITLE OF THE INVENTION.
- (b) CROSS-REFERENCE TO RELATED APPLICATIONS.
- (c) STATEMENT REGARDING FEDERALLY SPONSORED RESEARCH OR DEVELOPMENT.
- (d) THE NAMES OF THE PARTIES TO A JOINT RESEARCH AGREEMENT.
- (e) INCORPORATION-BY-REFERENCE OF MATERIAL SUBMITTED ON A COMPACT DISC.
- (f) BACKGROUND OF THE INVENTION.
 - (1) Field of the Invention.
 - (2) Description of Related Art including information disclosed under 37 CFR 1.97 and 1.98.

- (g) BRIEF SUMMARY OF THE INVENTION.
- (h) BRIEF DESCRIPTION OF THE SEVERAL VIEWS OF THE DRAWING(S).
- (i) DETAILED DESCRIPTION OF THE INVENTION.
- (j) CLAIM OR CLAIMS (commencing on a separate sheet).
- (k) ABSTRACT OF THE DISCLOSURE (commencing on a separate sheet).
- (l) SEQUENCE LISTING (See MPEP § 2424 and 37 CFR 1.821-1.825. A “Sequence Listing” is required on paper if the application discloses a nucleotide or amino acid sequence as defined in 37 CFR 1.821(a) and if the required “Sequence Listing” is not submitted as an electronic document on compact disc).

7. The drawings are objected to because figure labels for Figs. 19c, 19d, 19e, 19f, Figs. 20c, 20d, Figs. 21c, 21d, and Fig. 23e are not shown in the drawings. It appears that Figures are not missing, but rather there are Figures of drawings without proper labels. In any event, Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either “Replacement Sheet” or “New Sheet” pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

8. In the specification, page 21, line 10, one of the two periods is a typo. Correction is required.

9. Claims 1-3, 26 and 41-42 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claim 1, lines 2-3, "the wheels" lacks antecedent basis.

The wordings of claim 2 are not clear. Further, in claim 2, line 5, the word "preferably" is indefinite because it is not clear as to whether the feature associates with such word is intended to form part of the instant claimed invention. Further, the expression "the first and second railway tracks" lacks antecedent basis.

In claim 3, lines 2-3, "the first railway track to the second" lacks antecedent basis.

In claim 3, line 2, the expression "may be" is not clear as to whether the associated combined structures are intended to form the structure of the instant claimed invention.

In claim 26, lines 2-3, "the wheels" lacks antecedent basis.

In claim 41, line 7, "the wheels" lacks antecedent basis.

In claim 42, line 4, "the direction" and "the longitudinal axis" lack antecedent basis.

10. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

11. Claims 1-3 and 42 (2-3 as best understood) are rejected under 35 U.S.C. 102(b) as being anticipated by Eddy (US 741,896).

Eddy discloses a turnout apparatus having all of the features as recited in the instant claims, including turnout rails 8 with raised track surfaces, upper supporting member 5 positioned on top of the main railway track and supporting turnout rails 8

such that the raised track surfaces provide a path along which the wheels of a train can travel from a railway track to another railway track. The raised track surfaces of turnout rails 8 of Eddy include first high portions and second lower portions, as recited in instant claim 1.

Regarding instant claim 2, note that the raised track surfaces of turnout rails 8 of Eddy include first and second portions that allow each of a first wheel and a second wheel to be raised at a first portion for rail crossing and to be lowered at a second portion. Regarding the instant claimed feature associated with the word "preferably", as recited in instant claim 2, such feature is readable as not being required.

Regarding the instant claimed compared turnouts, as recited in instant claim 3, consider the pair of turnouts shown in Figure 4 of Eddy.

Regarding instant claim 42, consider the first and second non-intrusive crossovers 3-5 shown in Fig. 4 of Eddy; wherein, the non-intrusive crossovers comprise movable portions 3,5 and fixed portions 4 that do not project above a vertical height above the first or second railway tracks, as recited in the instant claim.

12. Claim 26 is rejected under 35 U.S.C. 102(b) as being anticipated by Bridges (US 1,315,702).

Bridges discloses a turnout having all of the features recited in instant claims, including track A with a pair of rails 10,11, raised track B with raised upper track surfaces; wherein, said raised upper track surface, as shown in Fig. 4, is coupled to upper supporting member 19 that rests on and is supported by a lower supporting member in the form of the rail head of rail 11. Regarding the moveable mechanism,

consider moveable mechanism 20,24 that couples the upper and lower supporting members together.

13. Claims 1 and 41 are rejected under 35 U.S.C. 102(b) as being anticipated by Toryowski (US 1,340,992).

Toryowski discloses a railway track system with a turnout that includes a pair of switch rails 4 provided with raised track surfaces for allowing crossing the rails of parallel tracks 1,2, and lower portions merging with the rails of parallel tracks 1,2.

Regarding the method steps recited in instant claim 41, note that an operation of a train over the track system of Toryowski would require the method steps as claimed.

14. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

15. Claims 1, 26 and 41 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 and 3 of U.S. Patent No. 7,604,205. Although the conflicting claims are not identical, they are not patentably distinct from each other because the patent claims include generally all significant features recited in the instant application claims.

16. Any inquiry concerning this communication or earlier communications from the examiner should be directed to MARK T. LE whose telephone number is (571)272-6682. The examiner can normally be reached on Mon-Fri, between 8:15-4:45 (Teleworking).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Samuel Morano can be reached on 571-272-6684. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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Primary Examiner
Art Unit 3617

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